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LEGISLATION AND INDIVIDUAL ACTION.

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The proper zones of legislation and of personal choice and action are constantly varying; and, at any given time, the actual zones are always more or less ill-defined and conflicting on the outer circumference of each. The most that can be done is to recognize certain general broad principles, apply them in the light of existing facts, and modify, limit or enlarge them as changed situations demand.

"The world is governed too much," has become a proverb. Upon examination it will be found that the excess of governmental interference, so far as quantity is concerned, is not confined to governments of arbitrary power, but is a chronic evil under the most popular forms of self-government. It is the quality and effect we are concerned with.

Pope said:

> "For forms of government let fools contest,
> Whate'er is best administer'd is the best."

The same thought has been expressed in the saying so oft repeated, that an absolute despotism would be the best form of government if only we could insure that the despot would always be both good and wise.

Therefore the real question between forms of government is: What form will best secure the prime great end of government — the protection of the individual. That is evidently a question of present conditions, arising out of past historical development.

Among modern communities of advanced intelligence and civilization absolutism finds no advocates. The settled conviction of such societies is that they can govern themselves better than anybody else would or could do it for them. And there is another element which enters largely into modern political liberalism. It is the instinct of individuality, separate self-hood, resulting in aversion to subjection and the feeling of a right to be heard, and, through the ballot box be counted, upon the question: By what laws shall we all be governed?

But when the theory and the form of the government have been settled a thousand debatable questions will arise as to *what* that government *ought to do*, and often, if the end is agreed upon, *how* it should be accomplished. No end has been found and none ever will be found to questions arising in the matter of law-making.

If we accept the formula that the only rightful power and legitimate function of government is to *protect* the individual in his life, liberty, person, property, reputation and contractual rights, we have not solved the problem, for at once questions will arise as to what is protection, the mode of protection, and the relative rights of the individual and of society as a whole.

Then this definition of the duty, this limitation of the power of government, though useful in a way, and ever to be borne in mind, does not cover the whole ground in modern life. There is a province or field of legislation that may be called *facilitating* useful things, exertions and objects; such as the formation of corporations, charitable and educational institutions, etc., a vast body of legislation that might be omitted, without government failing, in the strict and narrow sense, to protect adequately each member of the community. So in turn when this line or policy of legislative facilitation is adopted, one great difficulty is to make it effective without too much invasion of the zone of what are commonly called "natural rights"—in itself not a very definite expression.

Other formulas have been expressed; such as "Each should be allowed the largest liberty possible, compatible with the safety of the whole and the rights of others." True, theoretically, but difficult of exact application. Then we have always with us: "The greatest good to the greatest number;" a glittering generality with no practical meaning. *Sic utere tuo ut alienum non lædas* is likewise good as a general guide but has its indefinite and debatable boundaries. As to guns, dogs, explosives, machinery, excavations, etc., it can usually be applied with substantial justice.

But as applied to property and acts not naturally or in themselves dangerous to others, and which become so only by the manner of the use, or the extent and direction of the action, the question constantly arises: *How much* injury to others or to society at large will justify curtailing the benefit the individual might derive from a given use or action? Digging wells which interrupt underground streams, and the difference between surface streams and underground streams and percolation, have been pretty clearly worked out by the courts without the aid of legislation. "Wheeling" and "coasting" on public highways may yet demand restriction, though the writer's sons and grandsons do not think so.

It may be said of all these expressions and of others of a more purely political character, found in the Declaration of Independence, and in the writings of Locke and Milton, and other English liberals, and in the vast flood of abstract political thinking that preceded and accompanied the French Revolution, that their value is not the value of applied science, but lies in their *educational effect.* The excessive flood of legislative activity in the several States of the Union has caused recourse to be had to the numerous and ever increasing constitutional limitations upon the power of the legislature, useful in a general way, but extending fundamental law into great and inconvenient detail, in some degree an implied reflection upon the results of our popular representative system, and incurring the possible danger of leaving the legislature powerless in an unforeseen emergency, when power could be usefully exercised.

Bearing in mind that we have always to consider both the rights of society and the rights of each member of the body politic, the lights we have referred to will enable us *to see how to work*, but will not determine definitely the *form and character* of the work turned out. The relations of government, of legislation and even of Courts of Justice to the freedom of the citizen's action are being constantly and materially modified by the progress of invention, changed methods of production and of commercial intercourse, changed moral standards, modified political institutions, a civilization ever becoming more artificial and more complicated. Not to mention the vast and radical change made in many of the States of the Union by the abolition of slavery, other changes are constantly taking place, without legislation, constitutional amendment, revolution, or civil convulsion.

Lawyers are still living and practicing who have learned vast bodies and systems of law that have come into being, literally

evolved out of the judicial mind, since they were born, and mainly since they came to the bar. Such law has been evolved out of the necessities of the situation by applying intelligent judicial reasoning to steam, electricity, railroads, telegraphs, telephones, modern machinery, life insurance and many other subjects. Every law student reads, and must read, Coke and Blackstone. But let any young man study those celebrated writers carefully, then imagine himself calling them to life and placing them at the bar with their wigs, gowns, green bags and all, but strictly forbidding them to learn anything they did not know when they wrote standard law books, and they would be sadly put to it to earn their bread.

Every law student should be impressed that he will never make a great lawyer without some knowledge of political science and political economy and a great deal of knowledge of constitutional and international law. And he will be all the stronger by constant observation of the changes going on in production, transportation and distribution. Not merely these but all science, all knowledge are available. Nothing comes amiss to a lawyer. The writer once saw an action about a painting of alleged great value, defeated by — well plaintiff's counsel afterwards said, by defendant's counsel pretending to have more knowledge than he possessed of the different schools of art; and once saw a case for rent won, after it seemed to be lost, by the neat cross-examination of a physician, made possible by a little information about the current modern theory of germs and microbes. This only by way of illustration.

While the progress of science, and new forms of business methods affect the necessary educational and mental equipment of the practitioner, they also affect the tendencies of legislation. After a long historic struggle to limit the power of government over the individual, there is now a tendency to enlarge, both the theoretical and the practical power of government, and to attribute to mere legislative fiat a virtue and a power which it never possessed, and never will attain. From the theory that all power belongs to the people, some of the people are drawing the illogical conclusion that a sufficiently drastic exercise of that power would abolish poverty and suffering, abolish certain qualities and facts of human nature, and bring universal equality of condition, ease and comfort. This matter has a curious interest for the legal student. Restricting the zone of legislation, whether edicts of the crown or of hereditary aristocratic legislators, enlarged the zone of individual choice and action, and ultimately enlarged the polit-

ical power of the masses. Now, the masses are inclined to exaggerate their own corporate power, and to limit the action of the individual. The vice of imperialism is that the subject exists only for the State. The virtue of liberal institutions is that the State exists only for the free citizen.

Now, in the flush of the consciousness of being the source of all political power, the possible danger is that the people will attempt more than any government can accomplish; or, if it could, would result in suppressing all individuality, and would make the constituent members of the body politic very like a bushel of well worn pebbles, long subject to the action of great force, all alike, all very commonplace, and none of them gleaming with the light and beauty of precious stones.

Speaking in general terms, and subject to a few exceptions, the usual course of political evolution with our race, and in those countries largely influenced by Teutonic invasions, has been in the following order: Tribal elections of petty kings; the growth and consolidation of absolute, or nearly absolute, kingly power; the establishment and fostering, by that power, of local dignitaries, an aristocracy owning the land, the "feudal system,"—the oppression of the people by this aristocracy, while it also vied with or openly defied the Crown; the union of the Crown and people against the power and oppression of the nobles; a too free use, by the Crown, of regained power; and finally either a prolonged struggle, as in England, or a more sudden and convulsive struggle, as in France, between the Crown and the people. Sometimes, and even for long periods, we observe the curious fact that the right and capacity of the people to govern themselves, though found asserted in argument and political disquisitions, has, in its concrete expression, been in the form of concession by the royal power, thus having the appearance, on the surface of things, of coming downwards from above, instead of moving upwards from below.

Whatever the process, in any country or at any epoch, the germinal and effective idea was more the limitation of the power of government than the acquisition of power by the people, though that acquisition by the people came as a natural consequence. "The power of the Crown has increased, is increasing, and ought to be diminished." In the advanced stage of this contest, there came and afterwards was always present, the idea of the "social compact;" a powerful educator and liberalizer, but, for all that, the merest political theory in all history, for no historical fact is clearer than that "governments grow and are not made."

Finally, in the most advanced political communities it became an axiom that all political power inheres in, belongs to, emanates from the people. The idea that government should have and exercise no power but to protect the lives, liberty and property of the citizen, was earlier in the course of political thought, an argument in the contest, a stepping stone, now somewhat obscured, needing to be brought into view again.

By a swing of the political pendulum, unexpected and not foreseen by the liberal agitators, and yet in strict conformity with all great historical movements, no sooner has this theory of the political sovereignty of the people become a political fact, no sooner is it so well established as to become a part of elementary, popular, political thinking, than it begins to produce a multiplicity and a complexity of legislation never before known in the world's history. This by itself would not be so bad. But there is a tendency to inflate and pervert the theory and office of legislation, a tendency to widen its zone, multiply its subjects, and correspondingly limit the zone of individual action; to extend and minutely ramify statutory law, and limit personality. That this increase of statutory enactment is due in part to the greater complexity of modern civilization and the constantly changing forms of activity, is no doubt true. But, in addition to this, there is an undoubted tendency to magnify the curative and preventive power of legislation. Whether this be a real fruit of the feeling of the political completeness of citizen-sovereignty, or only a false application, arising from ignorance of sociology and of political science, or a combination of both, may not be quite clear. One form of the disease might be cured by a little rough experience, sad disappointment. The other form would be more radical and enduring, resulting in greater failure and disaster.

With those who are afflicted with this perverted form of political thinking and legislative activity, nearly all the ills of life are attributable to things which government has done, or things which the government could and should do but has left undone. The king-cure-all power of a statute, could increase wages, diminish the hours of labor, lessen the cost of living, make paper of rags and money of paper, and compel everybody to take it; one statute, by one nation, could regulate, all over the trading world, the relative value of two metals of coinage, the government can first manufacture fiat money by steam, then must turn banker and lend that money, at very low interest, on the security of stored agricultural products. A little reasoning would show that, it being the duty of the government to manufacture the money, it

had no right to charge any interest, and that considering the quality of the thing loaned, no security for its return was necessary. There are certainly enough debatable fields of proposed legislation. Only those are mentioned about which people who are at once well informed and courageous do not differ.

Then to avoid some of the undoubted abuses of corporate power, the government must possess and operate all the railroads, canals, telegraphs, telephones, etc., in the country. Only a very little extension of the reasoning could be made to embrace all the operations of mining, banking, manufacturing, transportation and distribution, even farming on a large scale — everything requiring capital and organization; anything which one man alone could not well accomplish. We would then have the civil millenium. The people would be about equally divided between those in office and those not in office. The power of the government would be greater than under any despotism in the history of our race. Both the opportunity and the temptation for fraud and oppression would exist on a scale by the side of which the late Panama scandals in France would become a mere bagatelle. The State would be everything, the man would be nothing; a congestion of power that would corrupt and destroy any government, no matter what its theory, its name, or its nominal frame-work.

This article is not intended for a topical legal discussion, with citation of authorities. It is designed to be suggestive to students of the law, and perchance to move some of them to prepare exhaustive articles upon subjects germane to the matter. The field is almost boundless,— only a few topics will be named:

Regulating the exercise of admitted corporate powers: Public health; schools, drainage, plumbing; business affecting health; food, intoxicants, medicine; infant labor in mines and manufacturing establishments; compulsory education; safety and fire-proof character of buildings to which the public are invited, such as hotels, theatres, concert halls; trade combinations; "Labor" questions, especially those affecting laborers employed in transportation of property, passengers, mails, and food, in which the public has an interest.

Upon these and kindred subjects it is evident that in many cases a careful and limited legislative interference would be just and might be beneficial; and equally evident that too much, or a too arbitrary interference will end in failure, and in harm to both the State and the individual. Much of the ground is experimental, and there may be danger that the consciousness of popular, suffrage-sovereignty may over-estimate the efficiency of

legislation in curing and preventing evils. Some of the subjects named, and many others, involve much of what has come to be known as police law or police regulations. All such law touches the movement, the action, the choice of the individual. In the form in which these questions get before the courts, they are legal, as recently at Ann Arbor. In the form in which they must be considered by the legislature they are politico-legal. Whatever name we give it, there is always involved the question: How far can legislation go without invading either the constitutional rights of the citizen, as they now exist — always a legal question — or, without invading those rights which, under our manner of political thinking, are commonly called natural and inalienable — always a political question? Existing law upon such subjects, so far as it is well settled, is accessible not so much in text books as in modern reports. Much remains unsettled, subject to legislative action and to evolution through judicial determination. The subjects may be considered in two ways; under existing constitutional limitations; and under the broader view of political science, having regard both to the public good and to liberty of personal action.

The principal text book which has fallen under the writer's observation is Tiedeman on Limitations of the Police Power. Valuable matter may also be found in Webster on Citizenship, and Morse on Citizenship.